(1) 00-1093

No. ——

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

WARREN BRANDON,
Petitioner,

v.

COMMONWEALTH OF VIRGINIA,
Respondant.

On Petition for Writ of Certiorari to the Virginia Supreme Court

PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTIONS PRESENTED

I

Did the Trial Court err by allowing argument and evidence of other crimes?

II.

Did the Trial Court err by not ruling that the sodomy should have been dismissed ~~since~~ the time of the offense was not proven?

III.

Did the Trial Court err by not allowing cross exam of Joey Collins' prior untruthful statements?

IV.

Did the Trial Court Err by not striking the evidence or setting aside the jury verdict because the victim's, witnesses', and informants' testimony was inconsistent, dishonest, and inherently incredible, and reasonable doubt of guilt was raised by the evidence?

V.

Did the Court err by ruling that the evidence was sufficient to sustain conviction on both indecent liberty charges since Brandon was never proven to have had the necessary lascivious intent?

VI.

Did the Court err by allowing Commonwealth to lead and cross-examine its witnesses?

VII.

Did the Court err by failing to reduce Brandon's sentence and to grant him a hearing?

VIII.

Did the Court of Appeals err by relying on a procedural bar?

IX.

Did the Court of Appeals err by not considering the Motion to reduce sentence?

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OPINIONS BELOW

The Orders of the Virginia Court of Appeals dated April 22, 1999 and January 11, 2000.

The Orders of the Virginia Supreme Court dated June 9, 2000 and July 21, 2000.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. 1257.

STATUTORY PROVISIONS INVOLVED

Amendments to the United States Constitution:

V. "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in militia, when in actual service in time of war of public danger; not shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; not shall private property be taken for public use, without just compensation."

XIV. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

STATEMENT OF THE CASE

Warren Brandon was convicted in Henrico Circuit Court by a jury on June 4, 1998 of forcible sodomy and two charges of indecent liberties with a minor (Code of Virginia Sections 18.2-67.11 and 18.2-370). He was sentenced to life, plus ten (10) years. Motions to set aside jury verdicts and reduce sentence were denied.

The Court of Appeals awarded an Appeal. The Appeal was denied by Order dated January 11, 2000. The Supreme Court of Virginia heard argument on his Petition on May 25, 2000 and denied his Appeal on June 9, 2000. The Petition to Rehear was denied on July 21, 2000.

REASONS FOR GRANTING WRIT

All questions presented were fully argued to the Virginia Court of Appeals and to the Virginia Supreme Court including argument made to the Virginia Supreme Court that the Virginia Court of appeals had raised procedural bars as a basis for denying consideration of questions presented. During opening (Tr. p. 13-16), the Commonwealth told the jury, Joey Collins (age 10) was exposed to pornography, masturbation by Brandon and others, and that Joey Collins masturbated in front of Brandon and others. In addition, the jury was told Joey Collins was in bed with his mother and Brandon and engaged in sexual acts. The Commonwealth told the jury that Brandon "told Joey to get behind his mother and "fuck your mother." In addition to that rape allegation, the Commonwealth also told the jury that Brandon put his hand on Joey's penis and masturbated him. The Commonwealth told the jury that Brand told Joey's mother "he sucked her son off. The Commonwealth never argued a common scheme or that these other crimes happened at the same time or met any of the recognized exceptions to allow statements of other crimes to be admissible. The

Commonwealth could have cured this defect up to its last sentence to the jury. It never did so.

Brandon asked for a mistrial (Tr. p. 19 l. 4-5). Brandon pointed out, that, attached to the Bill of Particulars were officer notes of statements from Brandon of two particular incidents, which Brandon believed were the basis of the indecent liberty charges against him. Brandon complained the jury has heard allegations of crimes that he was not charged with, not indicted for, and were never part of the record, including the preliminary hearing transcript of the two incidents. Brandon argued it was "prejudicial" (Tr. p. 20 l. 1). He asked, "to dismiss all charges" (Tr. p. 20 l. 4). The Court overruled Brandon's motions citing "well, I, I, think that with the totality of the circumstances it is allowable." (Tr. p. 20 l. 11-13). Brandon objected. His objection was contemporaneous. The Commonwealth told the Court that they had only filed a Bill of Particulars on the sodomy charge (Tr. p. 20 l. 17-23) although, at argument acknowledged that the officer's notes of Brandon's statements had been faxed to counsel for the Defendant as part of the Bill of Particulars. The Commonwealth raised no procedural bar to Brandon's Objections and Motions. The officer's notes were the basis of the evidence at the preliminary hearing.

There were two incidents when Joey came in the bedroom. One was around Christmas of 1996, when he was in bed with Carol with the door closed. The other incident was in June of 1997. The Commonwealth argued these incidents as the basis of the indecent liberties charge to the jury. (Tr. p. 192, l. 21-25). Brandon said he had no immoral intent towards the child on either incident. The door was closed. The first incident he was interested in the mother, the second, he was masturbating when Joey Collins came in unannounced wanting money. The door was closed on both incidents. He told Joey to get out (Tr. p. 29, l. 2).

Carol Collins testified that in August or September 1997 she was in bed with Brandon and Brandon told Joey to fuck his mother. Brandon denied the charge. Joey gave conflicting testimony from his mother relating to this incident. He said Brandon was dressed and said nothing to him (Tr. p. 701 l. 1-3) (Tr. p. 68 l. 24, p. 69 l. 1).

Joey said Mr. James Buck (who along with Brandon was charged with anal sodomy of Joey and pled guilty to multiple charges along with Carol Collins on June 4, 1998, had sexual contact with his anus. (Tr. p. 94 l. 19-21). He slept with Buck in the same bed. He later slept with Brandon (Tr. p. 95 l. 8-9). He said Brandon had brief anal sex with him. He did not know when it happened (Tr. p. 95 l. 24-25, p. 96 l. 11). Brandon denied having anal sex with him.

Prior to testifying to the anal sex, the Defendant objected to a series of leading questions that had been repeated. (Tr. p. 84 l. 17 p. 88 l. 11)

Joey was asked on cross about a series of lies he told. The Court ruled this questioning objectionable (Tr. p. 93 l. 18-23, p. 94 l. 1-16).

Collins never testified to any anal sodomy allegations against Brandon.

Inmate John Thomas said Brandon told him about anal sodomy with Joey. Brandon denied his allegation and said Thomas was curious. Thomas said he was out of his sentence in June or July and his motive for testifying was to keep Brandon off the street. Brandon later found out after trial that Thomas was yet to be tried and sentenced on a pending charge and his lawyer was lobbying with the Commonwealth for a break while he was testifying.

Nurse Patricia Guerney said Joey had what appeared to be evidence of anal penetration, she could not say when it occurred or who did it.

She and defense witness Dr. Ballo examined Brandon and each said Brandon had genital warts on his penis. This condition was contagious. Joey did not have any evidence of it being transmitted to him.

Steve Sykes said Brandon was a trustful and good employee.

It is well established that argument and evidence that proves or tends to prove that the accused committed crimes separate from one charged is prejudicial by its very nature, and should generally be excluded. *Kirkpatrick v. Commonwealth*, 211 Va. 269, 272, 176 S.E. 2d 802, 805 (1970), 211 Va. At 272, 176 S.E. 2d at 805; *Goins v. Commonwealth*, 251 Va. 442, 470 S.E. 2d 114 (1996); *Pugliese v. Rodriguez*, 249 Va. 203, 454 S.E. 2d 725 (1995). The purpose of this rule is to prevent confusion of offenses, unfair surprise to the Defendant and a suggestion of "criminal propensity", thus preserving the "presumption of innocence." *Crump v. Commonwealth*, 13 Va. App. 286, 411 S.E. 2d 238 (1991) (quoting *Lewis v. Commonwealth*, 225 Va. 497, 502, 303 S.E. 2d 890, 893 (1983); *Sutphin v. Commonwealth*, 1 Va. App. 241, 245-46, 337 S.E. 2d 897, 899 (1985). *Spencer v. Commonwealth*, 240 Va. 78, 90, 393 S.E. 2d 609, 617, *cert. Denied*, 498 U.S. 908 (1990; *Woodfin v. Commonwealth*, 236 Va. 89, 372 S.E. 2d 377 (1988). *Beck v. Commonwealth*, 253 Va. 373, 484 S.E. 2d 898 (1997). *Lafon v. Commonwealth*, 17 Va. App. 411, 438 S.E. 2d 279 (1993).

"Although . . . 'propensity evidence' is relevant, the risk that a jury will convict for crimes other than those charged-or that, uncertain of guilty, it will convict anyway because a bad person deserves punishment—creates a prejudicial efect that outweighs ordinary relevance." *Id.* at 650 (citing *United States v. Moccia*, 681 F. 2d 61 63 (1st Cir. 1982).

Because the jury erroneously heard testimony about prior bad acts, the defendant did not have a fair trial on the merits.

See Knick v. Commonwealth, 15 Va. App. 103, 421 S. E. 2d 479, 481 (1992). The error was not harmless, the verdict must be set aside, and a new trial held. The Trial Court's ruling that a "totality of the circumstances" standard was applicable to prove other crimes and bad acts is error. That standard is applicable only in establishing probable cause, *Illinois v. Gates*, 462 U.S. 213 (1983). The Court's ruling is plainly wrong – the standard for review—The Court's use of totality of circumstances standard is serious error and begs for examination by this Court.

The Commonwealth must, at the very least establish that an alleged offense occurred within the time frame stated in the indictment and before indictment. This, the prosecution *failed* to do, therefore, the jury's guilty verdict regarding Brandon should be set aside.

In the Commonwealth's case against Brandon, it stated in its three indictments that the offenses of indecent liberties occurred between September 1, 1996 and January 31, 1997, and between February 1, 1997 and October 22, 1997, respectively. The incident of anal intercourse charged that the incident occurred between September 1, 1996 and October 22, 1997. However, the prosecution's evidence regarding the sodomy charge did not establish *any* time at which the conduct allegedly took place. *Clinebell v. Commonwealth*, 3 Va. App. 362, 349 S.E. 2d 676, 679 (1986), *Hayes v. State*, 152 Ga. App. 858, 264 S.E. 2d 307 (1980).

The state must establish the existence of the corpus delicti and prove its case beyond a reasonable doubt. *Leybourne v. Commonwealth*, 222 Va. 374, 282 S.E. 2d 12 (1981). *Dorrantes v. Commonwealth*, 222 Va. 383, 281 S.E. 2d 383 (1981)

Cross-examination is fundamental to the truth-finding process. It is an absolute right guaranteed by the

Confrontation Clause of the Sixth Amendment. *Barker v. Commonwealth*, 230 Va. 370, 337, S.E. 2d 729 (1985) (citing *Shanklin v. Commonwealth*, 222, Va. 862, 864, 284 S.E. 2d 611, 612 (1981). *Barker v. Commonwealth*, 337, S.E. 2d at 734 (citing *Hewitt v. Commonwealth*, 226 Va. 621, 623, 311 S.E. 2d 112, 114, (1984). *Goins v. Commonwealth*, 251 Va. 442, 470 S. E. 2d 114, 124 (1996) (citing *Pennsylvania v. Ritchie*, 480 U. S. 39, 53 (1987).

In this case, defense counsel attempted to cross-examine the victim to establish that he had failed to tell the truth at certain times in the past. However, he was prevented from doing so when the Commonwealth's objections to certain questions were sustained (Tr. p. 93-94). *Whittaker v. Commonwealth*, 217 Va. 966, 967, 234 S.E. 2d 79, 81 (1977). *Brandon v. Commonwealth*, 22 Va. 4 App. 82, 87, 467 S.E. 2d 859 861 (1996).

It is permissible to impeach a witness by showing that the witness has a bad character for truthfulness, *Mohler v. Commonwealth*, 132 Va. 713, 111 S.E. 454 (1922). Brandon's right to cross-examine Joey was denied improperly by the Court, *Nichols v. Commonwealth*, 6 Va. App. 426 369 S. E. 2d 218 (1988).

The inconsistencies in the testimony of the victim against Brandon regarding the sodomy charge, and the fact that the jailhouse informant who testified against Brandon lied about his criminal record, cast doubt on the credibility of these witnesses. This testimony, therefore, constitutes insufficient evidence to support a guilty verdict.

Contradictory statements by a witness go to the weight and sufficiency of the testimony. *Swanson v. Commonwealth*, 8 Va. App. 376, 382 S.E. 2d 258 (1989); *see also State v. Hensley*, 462 S.E. 2d 550 (N.C. Ct. App. 1995). Given the inconsistencies in the testimony of the victim, his testimony

should not have carried sufficient weight with the jury to lead them to a conviction.

It has come to light after trial that the Commonwealth's jailhouse informant, John Thomas, who allegedly heard a confession by Brandon, lied at trial. When asked by the Commonwealth "What, if any, promises have you been made for testifying today?" Thomas responded, "None, ma'am. I'm actually out June, July the 10th on my sentence, you know." (Tr. at p.105). However, it has come to the attention of defense counsel after trial that Thomas had a pending charge against him at the time that he testified, which rendered his statement, that he was due to be released in July, 1988, false. In fact, Thomas was sentenced on August 6, to an additional year in jail.

It would be appropriate for the Trial Court to grand a new trial based on this after-discovered evidence. *Starks v. Commonwealth*, 225 Va. 48, 301 S.E. 2d 152 (1983).

A trial court has the authority to order a retrial after setting aside a guilty verdict on grounds of insufficient evidence. *Gorham v. Commonwealth*, 15 Va. App. 673, 426 S.E. 2d 493 (1993).

The Commonwealth filed a Bill of Particulars in this case and although the Court's copy does not include any attachments, the Defendant's counsel received copies of Brandon's statements to the police. These statements had also been provided at the preliminary hearing. The Commonwealth took the position that the statements were the basis of acts justifying the convictions. The Defendant disagreed.

Either statement proves no lascivious intent. The Defendant was in bed with Carol Collins on one occasion and alone on the other occasion. His evidence is that the door was closed and he told Joey to exit. These statements were the basis for the preliminary hearing.

These statements standing alone do not prove lascivious intent and are insufficient for a conviction, *Thacker v. Commonwealth*, 134 Va. 767, 770 114, S.E. 504, 505, *Banovitch v. Commonwealth*, 196 Va. 210, 215-16, 83 S.E. 2d 369, 373, 11954.

The evidence does not warrant a finding of lascivious intent of the Defendant beyond a reasonable doubt. The Defendant was in bed interested in Carol Collins on one occasion and interested in himself on another occasion.

There is no evidence he made any gestures towards Joey-in fact, the door was closed and Brandon told Joey to get out. He made no improper remarks to Joey. He never asked Joey to do anything wrong. *McKoen v. Commonwealth*, 211 Va. 24.

On page 86, the Commonwealth asked the victim what parts of his body Brandon had touched. The Defendant objected. The Commonwealth had asked a series of prior questions which made further questioning leading and cross-examination.

On Transcript Page 87, the Commonwealth asked the victim, "Now have any other parts of your body been touched by Mr. Brandon?", again, the Defendant objected.

Clearly, cross-examination and leading are not proper on direct examination. *See Bolton v. Commonwealth*, 200 Va. 5, 104 S.E. 2d 1 (1958). Leading questions are prohibited on direct examination, *Vass v. Commonwealth*, 30 Va. (3 Leigh) 786 (1931).

Certainly Brandon's Motion raised important issues for consideration at a sentence reduction hearing. The Defendant's 14th Amendment Constitutional rights were violated by the Court's refusal to grant a hearing on his Motion.

Brandon argues that the Court of Appeals' ruling of a procedural bar based on a violation of the contemporaneous objection rule is error and a violation of Brandon's 14th Amendment Constitutional due process rights. It was only until the Commonwealth never tied together any of its alleged other crimes arguments to the charges against Brandon that the Motions for a mistrial and Motion for Dismissal were timely made. The rule is ambiguous, but plainly says the objection must be made at the time of the ruling. That was done in this case. In fact, the Trial Court's *standard* of totality of circumstances was properly objected to. Brandon needs to make no further objections for good cause because the Court had set an impermissible standard for the admissibility of evidence and argument. The rule never mentions a contemporaneous objection or explains its full meaning. It is vague, ambiguous, and unreasonable.

Brandon argues that Court of Appeals ruling of a procedural bar are misguided and wrong. Brandon told the Trial Court that all of the Commonwealth's statements to the jury were objected to unless they dealt with his two statements (which were the sole evidence at the preliminary hearing) or anal sodomy evidence. (Tr. p. 19, l. 1-25, Tr. p. 20 l. 1-15).

The Trial Court denied Brandon's Motions for a mistrial and his Motion for a Dismissal. The Trial Court said "Well, I, I think with the totality of the circumstances, it is allowable. I'll, I'll allow it. The Motion is overruled." (Tr. p. 28 l. 11-14)

The Court had a complete and full understanding of the Motions. After ruling that the Court would "allow" the "totality of the circumstances", Brandon again objected. (Tr. p. 28, l. 14-15) By ruling that the objected to evidence "is allowable" (Tr. p. 28 l. 12), the Court had considered the issue and made its ruling. (Rule 5A: 18 Rules of the Supreme Court of Virginia). Brandon also objected in his written

Motion to set aside the verdict. The Commonwealth fully responded to that Motion and again the Court fully considered the same issue again. The Commonwealth *never*, in its response to the Trial Court (Tr. p. 252 p. 257), raised a procedural bar or objection. The procedural bar argument is misguided and wrong.

The Court of Appeals refused to address the issue of no hearing is error. Brandon was not given a hearing on his Motion to Reduce Sentence. Despite granting a Writ on that question presentation, the Court of Appeals violated Brandon's 14th Amendment Constitutional rights by not addressing this issue.

CONCLUSION

A Writ of Certiorari should be awarded.

Respectfully submitted,

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COURT OF APPEALS OF VIRGINIA

Present: Chief Judge Fitzpatrick,
Judges Coleman and Bray

Argued at Richmond, Virginia

Record No. 2434-98-2

WARREN H. BRANDON

v.

COMMONWEALTH OF VIRGINIA

January 11, 2000

FROM THE CIRCUIT COURT OF HENRICO COUNTY

George F. Tidey, Judge

Robert S. Ganey for appellant.

Kathleen B. Martin, Assistant Attorney

General (Mark L. Earley, Attorney

General, on brief), for appellee.

Warren Brandon (defendant) was convicted by a jury on indictments charging forcible sodomy and two counts of taking indecent liberties with a minor, violations of Code Section 18.2-67.1 and 18.2-370, respectively. On appeal, he argues that the trial court erroneously (1) allowed the Commonwealth to reference during opening statement, and later introduce, evidence of other sexual misconduct and related offenses by defendant, (2) permitted the Commonwealth to pose leading questions of child/victim, and

(3) imposed the sentences fixed by the jury. Defendant also challenges the sufficiency of the evidence to support the convictions. Finding no error, we affirm the trial court.

The parties are fully conversant with the record, and this memorandum opinion recites only those facts necessary to a disposition of the appeal.

I.

At the conclusion of Commonwealth's opening statement, defendant moved the court to declare a mistrial, arguing that the Commonwealth had improperly ascribed to defendant numerous criminl acts which were "not part of the indictments and charges" before the Court. He complains on appeal both that the court denied the motion and allowed the Commonwealth to later introduce evidence of such "additional bad acts" at trial.

"Making a timely motion for mistrial means making the motion when the objectionable words were spoken." *Yeatts v. Commonwealth*, 242 Va. 121, 137, 410 S.E. 2d 254, 264 (1991) (citation omitted), *cert. denied*, 503 U.S. 946 (1992). "Failure to make timely objection ordinarily constitutes a waiver . . . . Counsel cannot remain silent when improper argument is made and after the whole argument is concluded . . . successfully move for a mistrial" *Russo v. Commonwealth*, 207 Va. 251, 257, 148 S.E. 2d 820, 825 (1966). Thus, defendant's motion, first made at the conclusion of the Commonwealth's opening statement, was clearly untimely.

In apparent reliance on the earlier mistrial motion, defendant failed to object at trial when the Commonwealth sought to introduce evidence of other misconduct by defendant which had been mentioned during opening statement. "However, statements made during an opening statement are not evidence: and do "not 'open the door' to otherwise inadmissible evidence." *Bynum v.*

Commonwealth, 28 Va. App. 451, 458-59, 506 S.E. 2d 30, 34 (1998). Thus, objections during opening statement are no substitute for timely objections to evidence subsequently offered at trial. *Cf. Harward*, 5 Va. App. 468, 474, 364 S.E. 2d 511, 513. "Rule 5A: 18 precludes (our) consideration of challenges to admissibility of evidence to which there has been no timely objection," unless necessary to "attain the ends of justice," a circumstance not reflected on the instant record. *Id.* at 474-75, 364 S.E. 2d at 514.

Defendant next contends that the trial court erroneously permitted the Commonwealth to "lead()" and "cross examin(e)" the child/victim by asking, during direct examination, "other than the time your mom and the time when you were jacking off, was there ever any other time that you were undressed around (defendant)?" and "Now, have any other parts of your body been touched by Mr. Brandon?" Both inquiries were preceded by the child's testimony describing specific incidents involving defendant.

A leading question improperly "suggest(s) to the witness the answer desired." *Housenfluck v. Commonwealth*, 85 Va. 702, 707, 8 S.E. 683, 686 (1889). "Thus, any question on direct examination which *tends to reveal the answer desired* may be objectionable," an "obviously" "vague test" oftentimes determined by the "context of the question." Charles E. Friend, *The Law of Evidence in Virginia*, Section 3-5 (5th ed. 1999). The rule, therefore, must "be understood in a reasonable sense," permitting an "approach (to) points at issue" which "bring(s) the witness as soon as possible to the material" issues. *Hausenfluck*, 85 Va. At 707, 8 S.E. 2d at 696. "While we will not . . . say that (appellate courts) will not reverse because a leading question has been propounded to a witness (,) . . . trial courts are clothed with a large discretion in such matters, which (we) will not lightly undertake to control." *Flint v. Commonwealth*, 114 Va. 820, 823, 76 S.E. 2d 308, 310 (1912).

Here the subject questions did not suggest an answer but, rather, simply furthered the Commonwealth's inquiry into matters properly in issue and appropriate to the witness. We, therefore, find no error in the court's ruling

III.

Thirdly, defendant, without amplication, argues on brief that, "Certainly (his) Motion raised important issues for consideration at a sentence reduction hearing. The Court did not even grant a hearing."

It is well established that "(s)tatements unsupported by argument, authority, or citations to the record do not merit appellate consideration. We will not search the record for errors in order to interpret the appellant" contention and correct deficiencies in a brief.: *Buchanan v. Buchanan*, 14 Va. App. 53, 56, 415 S.E. 2d 237, 239 (1992). We, therefore, decline to address this issue. Lastly, defendant challenges the sufficiency of the evidence to support the convictions. In considering this issue, we view the record "'in the light most favorable to the Commonwealth, giving it all reasonable inferences fairly deducible therefrom. In so doing, we must discard the evidence of the accused in conflict with that of the Commonwealth, and regard as true all the credible evidence favorable to the Commonwealth . . . .'" *Watkins v. Commonwealth*, 26 Va. App. 335, 348, 404 S.E. 2d 859, 866 (1998) (citation omitted). The credibility of the witnesses, the weight accorded testimony and the inferences to be drawn from proven facts are matters to be determined by the fact finder. *See Long v. Commonwealth*, 8 Va. App. 194, 199, 379 S.E. 2d 473, 476 (1989). "When weighing the evidence, the fact finder is not required to accept entirely either the Commonwealth's or defendant's account of the facts (,)" but "may reject that which it finds implausible, (and) accept other parts which it finds to be believable." *Pugliese v. Commonwealth*, 16 Va. App. 82, 92, 428 S.E. 2d 16, 24 (1993). The judgment of the trial court will not be set aside

unless plainly Wrong or unsupported by the evidence. See Code Section 8.01-680. In support of the instant challenge, defendant first points to inconsistencies in the child's testimony and the failure of Commonwealth witness John Thomas to reveal a pending felony charge, both credibility issues. However, the child, then age 11, clearly recalled to the jury that defendant "took his penis and stuck it in (his) butt," testimony which was corroborated by independent evidence, including results of a physical examination

Defendant's argument that witnesses John Thomas testified untruthfully is likewise without merit. The record discloses that Thomas never questioned relative to any unresolved charges but simply denied promises of leniency or other inducements from the Commonwealth in exchange for his testimony.

Defendant further contends that the Commonwealth failed to prove that he exposed his genitals to the child with lascivious intent, an element necessary to the indecent liberty offenses. Again, his assertion is belied by the record. Defendant admitted to Investigator Cindy Wood and David Dickerson, a Child Protective Service Worker, that he was twice "naked" in the presence of the child. In the first instance, defendant admitted that the child "watch(ed)" him masturbate and "left the room" after "he finished." However, the child testified that he and defendant, "together," were "jacking off with (their) hands . . . on (their) penises." On the second occasion, the child's mother was performing fellatio on defendant, then "standing in front of her," when the child entered the room, and defendant directed him to "get up on the bed and . . . f___ your mother," "do like I do." The mother testified that the child then "got up behind" her and "went through the motions, like he was doing it, " while Defendant "look(ed) at him." All were naked.

The lasciviousness contemplated by statute "describes a state of mind that is eager for sexual indulgence, desirous of

inciting to lust or of inciting sexual desire and appetite." *McKeon v. Commonwealth*, 211 Va. 24, 27, 175 S.E. 2d 282, 284 (1970). Guided by such definition, we find that lascivious intent was manifest in defendant's conduct during the two perverse encounters with the child.

The record, therefore, provided ample support for the convictions.

Accordingly, we affirm the convictions.

Affirmed.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 9th day of June, 2000.

Record No. 000296
Court of Appeals No. 2434-98-2

WARREN H. BRANDON,

Appellant,

Against

COMMONWEALTH OF VIRGINIA,

Appellee.

From the Court of Appeals of Virginia

Upon review of the record in this case and consideration of the argument submitted in support of the granting of an appeal, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 21st day of July, 2000.

Record No. 00296
Court of Appeals No. 2434-98-2

WARREN H. BRANDON,

Appellant,

Against

COMMONWEALTH OF VIRGINIA,

Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 9th day of June, 2000 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

David B. Beach, Clerk

VIRGINIA:

In the Court of Appeals of Virginia on Thursday the 22nd day of April, 1999.

Record No. 2434-98-2
Circuit Court Nos. CR98-440,
CR98-440, CR 98-607

WARREN H. BRANDON,

Appellant,

Against

COMMONWEALTH OF VIRGINIA,

Appellee.

From the Circuit Court of Henrico County

Before Judge Coleman

This petition for appeal has been reviewed pursuant to Code Section 17.1-407(C), recodifying Code Section 17-116.05:2 (C), and is granted in part and denied in part. And an appeal is awarded to the petitioner from a judgment of the Circuit Court of Henrico County, dated September 8, 1998, with respect to the following questions:

I. Did the trial court err in admitting evidence of uncharged sexual conduct?

IV. Did the trial court err in denying the defendant's motion to strike?

V. Did the trial court err in finding the evidence sufficient to convict on both indecent liberties charges?

VI. Did the trial court err in overruling defendant's objection to the Commonwealth's leading direct examination of the child victim?

VII. Did the trial court err in imposing the sentence recommended by the jury?

Appeal bond or an irrevocable letter of credit in the amount of $500 shall be posted as required by Code Section 8.01-676.1 (B). The clerk is directed to certify this action to the trial court and to all counsel of record.

I. Pursuant to Rule 5A:25, an appendix is required in this appeal and shall be filed by the appellant at the time of the filing of the opening brief. The remainder of the petition for appeal is denied for the following reasons:

II. "When time is not an element of the crime charged, the jury verdict will stand if the evidence is sufficient to prove beyond a reasonable doubt that a crime occurred and that the defendant committed the crime, even though the evidence is such that there may be reasonable doubt as to the day on which the offense occurred." *Marlowe v. Commonwealth*, 2 Va. App. 619, 623-24, 347 S.E. 2d 167, 170 (1986). The evidence was sufficient to prove that the victim was only ten years old at the time of the offense.

Appellant was changed with sodomy that occurred between September 1, 1996 and October 22, 1997. The record contains evidence that Carol Collins and her son, the victim, met appellant in 1996. Collins dated appellant from May 1996 until June 1997, and then again during August or September of 1997. During that time period, Collins and her son stayed in appellant's apartment, although they had their own apartment. The victim testified while in appellant's bedroom in appellant's apartment, appellant "took his penis and stuck it in my butt." The record also indicates that appellant was in jail from November 1, 1997 until the time of trial. The Commonwealth proved that the sodomy offense occurred within the time frame as charged. Although there may be some doubt as to which day the sodomy occurred, the evidence proves beyond a reasonable doubt that the sodomy occurred and that appellant committed the sodomy.

III. One method of impeaching a witness is by attacking the witness' character. *See Clinebill v. Commonwealth*, 235 Va. 319, 323, 368 S.E. 2d 263, 265 (1988). "Ordinarily, character is attacked by presenting testimony that the witness' general reputation for truth and veracity is bad . . . (A) witness' character may not be impeached by showing specific acts of untruthfulness or bad conduct." Id. (citations omitted). Additionally, in sex crime cases, the complaining witness may also be impeached by proving that he or she has made prior false accusations regarding sexual matters. *See id.* at 325, 368 S.E. 2d at 266.

Appellant attempted to cross-examine the ten-year-old victim by asking whether he had ever lied about homework, or teachers, or about breaking things in the apartment. Such questioning was not a proper method of impeachment; the questions neither addressed the victim's general reputation for truth and veracity, nor did they refer to prior false accusations. Therefore, the trial judge did not err by refusing to allow this questioning.

This order is final unless, within fourteen days from the date of this order, there are further proceedings pursuant to Code Section 17.1-407 (D), recodifying Code Section 17-116.05:2(D), and Rule 5A:15(a). If appellant files a demand for consideration by a three-judge panel, the demand may include a statement, not to exceed one typewritten page, identifying how this order is in error.

A copy,

Teste:

Cynthia L. McCoy, Clerk

By:

Deputy Clerk

CERTIFICATE OF CLERK

I, Cynthia L. McCoy, Clerk of the Court of Appeals of Virginia, do hereby certify that on April 22, 1999 an appeal was awarded as described in this order to which this certificate is appended. A copy of this certificate and a copy of the order to which it is appended were this day mailed to the trial court indicated in the order and to all counsel of record.

Given under my hand this 22nd day of April, 1999.

Cynthia L. McCoy, Clerk

By:

Deputy Clerk